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In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Petitioners' daughter was killed in a boating mishap when struck by the propeller of an engine manufactured by Respondent. Petitioners claim that the failure of Respondent to provide a propeller guard or other protective device on its product violates several common law duties.

Are these common law claims pre-empted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311, where the Act (a) expressly pre-empts only those state laws that conflict with regulations promulgated by the Coast Guard, which has never promulgated a regulation concerning propeller guards; and (b) the Act provides that "[c]ompliance with [the Act] does not relieve a person from liability at common law"?

PARTIES TO PROCEEDINGS

To the best of Petitioners' knowledge, the caption contains all of the parties to this action. Petitioner draws the Court's attention to Respondent's Rule 29.6 Statement in the Brief For The Respondent In Opposition, which sets forth Respondent's nonwholly owned subsidiaries.

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OPINIONS AND ORDERS IN THE CASE

1. *Lewis v. Brunswick Corp.*, 922 F.Supp. 613 (S.D. Ga. 1996) (Pet. App. A26). Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy) and 28 U.S.C. § 1441(a) (removal).

2. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997) (Pet. App. A1). Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts).

3. *Lewis v. Brunswick Corp.*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 96-8130. Entered May 15, 1997 (Pet. App. A33).

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on March 21, 1997, and denied rehearing on May 15, 1997. The petition for writ of certiorari was filed on August 13, 1997. This Court granted certiorari on November 14, 1997.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and regulations are lengthy and are reprinted verbatim in the appendix to this brief. These provisions are 46 U.S.C. §§ 4302, 4306, and 4311, and 5 U.S.C. § 553.

STATEMENT OF THE CASE

1. THE DEATH OF KATHRYN C. LEWIS

Kathee Lewis was a 19 year old college student from Healdton, Oklahoma, and the daughter of Petitioners Vicky and Gary Lewis (the "Lewis Family"). Joint Appendix ("App.") 4, 6. On June 6, 1993, she was a passenger on a boat on Strom Thurmond Lake in Georgia at the invitation of her boyfriend's family. App. 5. This boat was powered by an outboard motor manufactured by Respondent Brunswick Corporation ("Brunswick"). App. 32-33. The engine had exposed propeller blades and no protective guard, shroud, or nozzle. App. 33-34.

During a turning maneuver, Kathee Lewis was ejected from the boat and struck by the rapidly rotating propeller blades of the outboard motor manufactured by Brunswick. App. 32. Kathee was pronounced dead at the scene. App. 32, 5-6. The coroner's report concluded that Kathee's death was caused by "chop wounds to (the) head and upper body." *See* App. 6, 32-33.

On June 2, 1995, the Lewis Family filed suit in the Superior Court of Columbia County, Georgia against Brunswick. App. 4. The crux of the complaint involves Brunswick's failure to provide a guard to protect Kathee from contacting the whirling propeller blades and thereby preventing her fatal injuries. The Lewis Family contends that Brunswick is liable under strict liability and negligence theories for its failure to provide such a guard. *See generally* App. 6-13. Brunswick removed the case to the United States District Court for the Southern District of Georgia pursuant to 28 U.S.C. § 1441(a). App. 1.

Brunswick moved for summary judgment, arguing that the Lewis Family's common law claims are pre-empted by the Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 ("Boat Safety Act"). App. 1. This Act provides that certain state "law[s]," "regulation[s]" and "requirement[s]" which conflict with enacted federal regulations are pre-empted, while also providing that "[c]ompliance with [the Act] does not relieve a person from liability at common law or under state law." *See* 46 U.S.C. §§ 4306, 4311(g).

Summary judgment was granted to Brunswick by the district court, and affirmed by the United States Court of Appeals for the Eleventh Circuit. App. 2, 3. The Eleventh Circuit held that the Lewis Family's common law claims were not expressly pre-empted by the Boat Safety Act. Pet. App. A14. The circuit court went on to hold, however, that Petitioner's common law claims were impliedly pre-empted. Pet. App. A24. The lower court reasoned that Congress had intended to pre-empt the entire field of boat safety, even though the federal government never promulgated a regulation on propeller guards, and even though the Act had an express savings provision. Pet. App. A21-A23.

2. THE BOAT SAFETY ACT

Congress enacted the Boat Safety Act to address perceived shortcomings in boating safety and existing federal boating legislation. Specifically, the existing scheme had a "serious deficiency" in that it placed the burden of safety compliance solely on the boat owner or operator, even for safety equipment that was "almost always sold

as an integral part of the boat or engine." S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1335. "Clearly," the Senate Report stated, "equity requires that the responsibility at the outset for providing the boatman with a safe boat must lie with the manufacturer. Practicalities of enforcement and the tremendous growth in numbers of boats and boatmen require the same result." *Id.*

The purpose of the Act was thus to "provide a coordinated national boating safety program involving both the Federal Government and the States." *Id.* at 1333. Among other things, Congress also wished to "encourag[e]" uniformity among boating laws, reciprocity, comity, and cooperation among jurisdictions and levels of Government. *Id.* at 1337. Congress thought the Act necessary since "[s]imilar federal legislation exists with regard to other products, including aircraft and motor vehicles." *Id.* at 1337.

In furtherance of these goals, the Boat Safety Act provides that the Coast Guard "*may* prescribe regulations" to establish "*minimum* safety standards" for boating equipment. 46 U.S.C. § 4302(a)(1) (emphasis added). Congress thought the "standards to be promulgated" under section 4302 of the Act "could substantially reduce the level of fatalities now resulting from boat mishaps." S. REP. No. 248, 92nd Cong., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1334. This approach would also allow for greater flexibility in enacting regulations. *Id.* at 1335. Such potential standards were necessary because the "industry readily admits that one-fourth of all boat manufacturers do not comply with . . . the industry's self-imposed minimum safety standards." MERCHANT

MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 82.

The Coast Guard's authority to issue minimum safety standards under section 4302 of the Boat Safety Act is permissive, and not mandatory. S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1338. The Act specifically sets forth the procedures that the Coast Guard must follow to prescribe such a regulation, including the actual publishing of a standard and the express provision for a future effective date after its initial publication. 46 U.S.C. § 4302(b). Thus Congress

> requires certain actions by the [Coast Guard] in the development of safety standards. . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the informal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553.)

S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1340. Any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

Another problem with the prior law was that it specifically required boat operators to comply with varying state legislative or administrative numbering requirements. *See* MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 101. Moreover States had also enacted several regulations in regard to capacity and safe powering standards, and "it is only a matter of time before

more States become actively involved in writing safety standards which will have broad application to manufacturers." *Id.*[1] Congress thus provided in the Boat Safety Act that any state "law," "regulation" or "requirement" which conflicted with "a regulation prescribed under section 4302" of the Act was pre-empted. 46 U.S.C. § 4306.

A congressional subcommittee also specifically added a "savings clause" to the Boat Safety Act prior to passage, which provides that "[c]ompliance with [the Boat Safety Act or regulations prescribed thereunder] does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). This committee amendment was added due to the urging of Richard Schwartz, the Executive Director of the Boat Owners Association of the United States, who testified that

> we would recommend a savings provision with respect to the consumers' private remedies, which is not touched upon by the present Bill. We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits. It should be made clear that this Act *does not preempt state or common law.* In addition, we would further state that the failure of the Secretary to promulgate a standard shall not be admissible in a private proceeding. *This would preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition.*

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[1] This warning obviously concerned state enactments of legislation or administrative rules, and not common law tort concepts which pre-dated the Boat Safety Act.

MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88 (emphasis added). Thus the savings clause

> is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value.

S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352. The savings clause is the only portion of the Boat Safety Act which addresses private remedies for the victims of tortious behavior.[2]

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[2] The Commandant of the Coast Guard, in response to a Senator's question about the inclusion of an express savings clause, also stated that

> [w]e do not believe that compliance with promulgated standards under the Act has the effect of relieving a manufacturer from liability under the usual tort law concerning negligence or warranties. For many years the Coast Guard has required compliance with "standards" by inspected vessels. Courts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with "seaworthiness" under maritime law. Though the analogy is apparent we would have

3. THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS

The need to address propeller injuries in recreational boating has been long recognized. Since the 1970's, "propeller injuries have been demonstrated in the medical literature as a dramatic but largely preventable class of injury." App. 175. Propeller injuries frequently involve multiple wounds which can result in death or "traumatic or surgical amputation." App. 178. Since the injuries are incurred in the water, there is significant blood loss (due to increased coagulation time) and risk of infection from water-borne organisms. App. 178. A 1992 study found that the victim's average cost for hospital and physician care alone exceeded $100,000 per serious injury. App. 178.

Since 1910, at least 21 patents for propeller guards have been awarded by the United States Patent Office. App. 205-206. Mercury Marine, a division of Respondent and the dominant manufacturer in the boating propulsion market[3], has tested propeller guards and water jets since the early 1970's. App. 213. Many of the Mercury tests noted little impact on running speed or performance. App. 213-215. One of Respondent's competitors (OMC)

> no objection to an express provision to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability which otherwise could pertain.

MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 66.

[3] In 1988, Mercury earned greater than $280 million while its next largest competitor (OMC) reported net earnings of $70 million. App. 236.

sells propeller guards for boats operating at 15 miles per hour or less, and several private companies have offered guards as after-market accessories. App. 237, n.38, n.40. Propeller guards are also used by the United States Marine Corps and several international rescue units. App. 62-64.[4]

On April 13, 1988, the Coast Guard asked the National Boating Safety Advisory Counsel ("NBSAC") to consider whether the Coast Guard "should . . . move towards a federal regulation for some form of propeller guard." App. 76. On May 11, 1988, NBSAC in turn appointed a subcommittee to consider the Coast Guard's question. App. 46. NBSAC is considered an advisory committee to the Coast Guard under the Federal Advisory Committee Act of 1972 ("FACA"). *See* 5 U.S.C. App. 2. It is difficult to track the deliberations of the advisory subcommittee, however, since no minutes or transcripts of individual meetings of the subcommittee were kept. Dist. Ct. Dkt. 5, Exh. 9, pp. 18-19. Notes kept by the individual members of the subcommittee were discarded, and there was no attempt to maintain such documents. *Id.* at pp. 36-37. Preliminary drafts of the final report of the subcommittee are not extant, either. *Id.* at p. 20. Importantly, no notes exist of an *ex parte* demonstration which Richard Snyder of Respondent's Mercury Marine division held for several members of the advisory subcommittee in Oshkosh, Wisconsin, at which no federal agent was present. *Id.* at pp. 8-11.

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[4] *See generally* App. 199-225 for a more thorough discussion on propeller guard feasibility and testing.

The recommendation of the subcommittee to the advisory board was ultimately that "the U.S. Coast Guard should take no regulatory action to require propeller guards" at that time. App. 73. In arriving at this recommendation, the propeller guard subcommittee specifically noted the presence of product liability claims against boat manufacturers (App. 50-53), yet never urged their pre-emption. The subcommittee also noted that it could not recommend propeller guard regulations

> [s]ince there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible.

App. 71. The subcommittee did not state that propeller guards were dangerous in all cases.[5]

On November 7, 1989, NBSAC approved the subcommittee's advisory report. App. 138. The NBSAC Chairman assured the council and the public that the issue of propeller guards "is not a dead issue," however, and stated that a subcommittee would be reconvened if new information became available. App. 139.

The Coast Guard then, by letter dated February 1, 1990, adopted all of the recommendations in the subcommittee's advisory report – including the recommendation that the Coast Guard "should take no regulatory action to require propeller guards." App. 163. In adopting this

[5] For a detailed criticism of the advisory subcommittee's investigation and recommendation, *see generally* App. 230-235.

recommendation, the Coast Guard reiterated the concern that there was no universal design then available:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 163. The Coast Guard, like NBSAC and its advisory subcommittee, never indicated that it intended to ban propeller guards or to pre-empt common law actions relating to such guards. As a matter of fact the Coast Guard, in that same letter of February 1, stated that it was considering "available propeller guards" as a topic for national education programs "aimed at avoiding boat/propeller strike accidents." App. 165.

In adopting the recommendation not to undertake regulatory action, the Coast Guard never began (much less finished) the regulatory procedure set forth in either section 4302 of the act, or in the Administrative Procedure Act, to create a regulation which addressed propeller guards at all. Nothing was ever published in the Federal Register relating to proposed (let alone final) rulemaking on propeller guards, nor does the record reflect that the Coast Guard ever held a notice-and-comment period on propeller guard regulations. The Coast Guard also never published its decision to take no regulatory action as required for regulations.

SUMMARY OF THE ARGUMENT

The Lewis Family's common law claims against Brunswick are not pre-empted by the Boat Safety Act.

In order to determine the pre-emptive scope of the Boat Safety Act, this Court must first "identify the domain expressly pre-empted" by the Act. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996). The Boat Safety Act expressly pre-empts only the implementation of certain state "law[s]," "regulation[s]" or "requirement[s]" which conflict with "a regulation prescribed under section 4302 of [the Act]." 46 U.S.C. § 4306. In order for a regulation to be promulgated under section 4302 of the Boat Safety Act, Congress required that it be published and have a future-effective date at least 180 days from the date of publishing. 46 U.S.C. § 4302(b).

The only "action" taken by the Coast Guard concerning propeller guards was to adopt an advisory recommendation *not to even undertake regulatory action* because (in part) it could not arrive at a universal design for all boat engines. This adoption was not the subject of any rulemaking proceeding, was never published in the Federal Register, and was never made subject to a "future effective date." This mere adoption of a recommendation not to undertake regulatory action was therefore not "a regulation prescribed under section 4302" of the Boat Safety Act. Common law actions concerning propeller guards are thus not within the domain expressly pre-empted by the Boat Safety Act since there is no federal regulation concerning propeller guards whatsoever. This Court recently addressed a virtually identical issue in

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995), and found that common law claims were not pre-empted under a similar statute where there was no federal regulation governing the relevant safety feature.

Furthermore, the text of the Boat Safety Act's pre-emption and savings clauses also show that Petitioner's claims are not within the domain expressly pre-empted. The pre-emption provision refers to state legislative and administrative enactments, but does not refer to common law. Moreover, Congress expressly provided in the Act's savings clause that "[c]ompliance with [the Boat Safety Act or regulations promulgated under it] does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g). The fact that the Boat Safety Act does not refer to "common law" in its express pre-emption clause, *coupled with the express reference to "common law" in the savings clause*, leads to the logical conclusion that common law tort claims are not part of the "domain expressly pre-empted" by the Boat Safety Act. The legislative history also confirms that Congress contemplated the survival of common law actions in situations where, as here, the Coast Guard chose not to enact any regulation on point.

It is also improper to imply pre-emption in this case. When Congress has considered the issue of pre-emption and expressly sets forth the pre-emptive scope of an act, there is an inference that Congress has spoken conclusively on the pre-emption question and that, therefore, further pre-emption should not be found by implication. *Freightliner*, 115 S. Ct. at 1488. "Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the

pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517.

The Court must therefore determine whether the implication of further pre-emption is warranted, or whether the pre-emptive scope of the act is "governed entirely" by the express language in the Act. *See Cipollone*, 505 U.S. at 517; *Freightliner*, 115 S. Ct. at 1488. The best evidence of Congress' pre-emptive intent is the plain wording of the legislation itself. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). As shown above, Congress has expressly stated what it was pre-empting; what it was saving from pre-emption; and what the federal agency must do to create a potentially pre-emptive regulation. 46 U.S.C. §§ 4306, 4311(g). Thus the language of the Boat Safety Act gives a "reliable indicium of Congressional intent with respect to state authority" and *entirely governs* its pre-emptive scope. *See Cipollone*, 505 U.S. at 517. The further implication of pre-emption beyond Congress' express text is therefore improper.

Moreover, this Court has recognized only two instances in which implied pre-emption may exist in the face of an express pre-emption clause. The first instance is where it is impossible for an actor to comply with both the federal law and state law. *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). This conflict must be so great as to make it *physically impossible* for a party to comply with both federal and state law. It is not physically impossible for Brunswick to comply with both the Boat Safety Act and state law, since there is no enacted regulation which addresses propeller guards at all, and Respondent concedes that federal law in no way

prohibited it from installing a guard on the propeller that caused Kathee Lewis' death. A finding of tort liability will therefore not mandate any outcome which is not allowable under federal law. *See Freightliner*, 115 S. Ct. at 1488; *Medtronic*, 116 S. Ct. at 2258.

The second instance is when the preservation of common law claims would stand as an obstacle to the objectives of Congress in enacting the legislation at issue. The lack of any federal regulation on the issue of propeller guards establishes that there is no federal purpose to frustrate. *See Freightliner*, 115 S. Ct. at 1488. Moreover, since Congress expressly saved "liability at common law" from pre-emption in the Boat Safety Act, it is illogical to conclude that common law liability stands in the way of congressional purpose. Rather, this express saving of common law shows that Congress intended to allow the victims of tortious behavior to seek compensation from wrongdoers.

The imposition of common law liability would also help to promote uniformity because it may encourage manufacturers to opt for designs which are reasonable, feasible, and safe. Common law thus may bring greater uniformity than now exists, where manufacturers have the unregulated ability to build protective devices of all shapes, sizes, materials and designs, or to provide none at all. The preservation of common law actions therefore does not frustrate the purposes of Congress, but rather promotes them.

ARGUMENT

I. Common Law Claims Are Not Expressly Pre-empted by the Boat Safety Act

A. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Express Pre-emption

This Court has established a common sense framework to determine the pre-emptive scope of a federal act. "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX*, 507 U.S. at 664. While the presence of an express pre-emption clause does not foreclose the possibility of implied pre-emption, the pre-emptive scope of an act will still be "governed by [its] express language" if it provides a "reliable indicium of Congressional intent with respect to state authority." *See Cipollone*, 505 U.S. at 517. The Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Cipollone*, 505 U.S. at 516 (emphasis added).

The first task in the analysis is thus to determine the "domain expressly pre-empted" by the terms of the Boat Safety Act. *See Medtronic*, 116 S. Ct. at 2250. The pre-emption clause of the Boat Safety Act provides in pertinent part that

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel

> or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

In order to fall under the domain expressly pre-empted, then, Petitioner's claim must be a law, regulation, or requirement which conflicts with "a regulation prescribed under section 4302" of the Act. It is undisputed that no regulation has ever been prescribed under section 4302 concerning propeller guards, however, and thus Petitioner's common law claims are not within the domain expressly pre-empted by the Boat Safety Act.

The Coast Guard submitted the issue of whether it should "move towards a federal requirement for some form of propeller guard" to an advisory board, which in turn appointed a subcommittee to study the issue. App. 76, 46. After this study, the advisory subcommittee recommended in 1989 that "[t]he U.S. Coast Guard *should take no regulatory action* to require propeller guards" at that time since it could not find a suitable universal design. App. 73 (emphasis added). The Coast Guard then internally adopted this recommendation to take no regulatory action, and never even began formal rulemaking activities under section 4302 of the Boat Safety Act or under the Administrative Procedure Act. App. 138.

Because this adoption did not meet the express requirements of section 4302 of the Boat Safety Act, it can not have pre-emptive effect.

A nearly identical situation existed in *Freightliner*, which involved claims that tractor-trailer manufacturers were negligent or had built defective products by not including antilock brake systems ("ABS") on their products. The defendant manufacturers argued that these claims were pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982) ("Motor Vehicle Safety Act"). The Motor Vehicle Safety Act is similar in many respects to the Boat Safety Act, in that it pre-empts states from establishing "any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d)(1982). The Motor Vehicle Safety Act also has a savings clause nearly identical to the Boat Safety Act, which commands that "[c]ompliance with any Federal motor safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c)(1982); *compare* 46 U.S.C. § 4311(c)(g). Importantly, the Motor Vehicle Safety Act also provided that the National Highway Traffic Safety Administration ("NHTSA"), which had the authority to issue regulations, had to formally issue pre-emptive regulations in accordance with the Administrative Procedure Act. 15 U.S.C. § 1392(b)(1982).

Pursuant to its regulatory authority, NHTSA promulgated braking regulations (known as "Standard 121"), which did not require ABS devices but set forth criteria for them if used. *See Paccar, Inc. v. NHTSA*, 573 F.2d 632

(9th Cir.), *cert denied*, 439 U.S. 862 (1978) (citing 36 Fed.Reg. 3817 [1971]). This enacted standard was subsequently suspended by a federal court in *Paccar*, based in part upon faulty fact-gathering and reliance on reports with chronic underreporting of claims. 573 F.2d at 632. NHTSA nevertheless stated that it would keep the regulations setting forth Standard 121 in place, so that manufacturers would know "what the agency still considers to be reasonable standards for minimum acceptable performance." *Freightliner*, 115 S. Ct. at 1486 (quoting 44 Fed. Reg. 46,849 [1979]). It also kept Standard 121 in the Code of Federal Regulations so that "the affected sections [could] most easily be reinstated" when the problems with the regulation's enactment were cured. *Ibid.* After the *Paccar* decision, and before the *Freightliner* decision, NHTSA also amended Standard 121 to clarify that ABS devices would not be required on trucks and trailers. *Freightliner*, 115 S. Ct. at 1486. Standard 121 was never finally reinstated by the time of *Freightliner*.

This Court held that, even though the federal agency actually enacted a regulation on point, *and* expressly maintained this standard to inform the industry of the agency's intent, *and* expressly stated its desire to reinstate the regulation, the suspended regulation did not have pre-emptive effect. The Court held that "[i]n the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all." *Freightliner*, 115 S. Ct. at 1486. This is strikingly similar to the situation at bar, since there is no promulgated safety standard which addresses propeller guards.

Indeed, the manufacturer's argument in *Freightliner* was even stronger than Respondent's position in this case

since the federal agency in *Freightliner* had actually undertaken formal regulatory action. Unlike the Coast Guard, NHTSA published its intent to promulgate a standard (32 Fed.Reg. 14,278 [1967]); published a notice of proposed rulemaking (34 Fed.Reg. 1055 [1969]; and published a final regulation with a future effective date (35 Fed.Reg. 10,368 [1970]). By contrast, the Coast Guard never even began formal rulemaking, as expressly required by the Boat Safety Act.

Since NHTSA followed the Administrative Procedure Act and properly enacted a regulation, a court was able to investigate the procedures by which the federal agency arrived at its regulatory decision. Here, by contrast, there has never been any regulation concerning propeller guards and thus there is nothing for a court to "invalidate." Moreover, since there were no notes or transcripts retained from the advisory subcommittee's meetings (*ex parte* or otherwise), a court cannot review the validity of its fact-finding as the *Paccar* court was able to do. This is a precise reason why the Boat Safety Act requires the actual promulgation of a regulation in order to pre-empt state safety standards which protect its citizens: to allow the judiciary to review the propriety of the agency's actions. *See* S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 1333, 1340 ("Any person who believes himself to be adversely affected by the promulgation of a standard [under the Boat Safety Act] may obtain judicial review in accordance with the Administrative Procedure Act").[6]

[6] This is also why FACA requires advisory committees to maintain transcripts and notes of its meetings: to allow the public and the courts to challenge the propriety of the subcommittee's advice and recommendations. 5 U.S.C. App. 2, § 10(b), (c).

Moreover the federal agency in *Freightliner* specifically kept the suspended regulation in place to apprise the public (and manufacturers) of what it considered to be acceptable standards of performance, and expressly stated that it did not wish ABS devices to be mandated on trucks. It also kept the regulations on the books with the express intent to revive them when possible. Thus although there was no enforceable regulation in place, and despite the court's ruling in *Paccar*, NHTSA expressly proclaimed that it did not wish to require ABS devices on trucks. Even so, *Freightliner* held that there was *no pre-emption*. The Coast Guard, by contrast, has never set any standards at all concerning propeller guards. There is thus even *less* reason to find pre-emption here than in *Freightliner*.

In an effort to distinguish the holding of *Freightliner*, Respondent maintains that section 4306 broadly pre-empts *all* state law – whether positive law or common law – unless it imposes a duty identical to a standard or regulation promulgated under section 4302. Cert. Opp. 21, n.5. Thus, the argument goes, if there is no federal standard at all, any state law duty cannot be identical to a federal standard and is thus pre-empted. This interpretation is contrary to the terms and purposes of the Boat Safety Act, however, as well as this Court's prior decisions.

First, section 4306 by its express terms pre-empts state law **only** when a federal standard or regulation is in

place; *it says nothing about pre-emption of state law in the absence of such a standard or regulation*. Congress thus expressly intended for the Coast Guard to promulgate actual regulations if it wished to create a potentially pre-emptive regulation. The Coast Guard has taken this position in regard to personal watercraft, for example. NBSAC appointed a personal watercraft subcommittee, and "[t]he basic question that was looked at was whether the Coast Guard should come up with new regulations or if it should be left to the states to regulate these craft." App. 129. After deliberations, the advisory subcommittee recommended that "personal watercraft regulation and legislation be relegated to State and Local jurisdictions." App. 130.

This intent is also clear from the legislative history of the Act, where Congress contemplated that "[a]ny person who believes himself to be adversely affected by the promulgation of a standard may obtain judicial review in accordance with the Administrative Procedure Act." S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1340. Congress did not provide for any such relief in the *absence* of a promulgated standard, and it is presumed that Congress would not deprive aggrieved parties the right to challenge the validity of a pre-emptive *lack of regulation* in court. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). Congress simply gave the Coast Guard permissive authority to enact regulations if it so chose, and did not so much as intimate that there was pre-emption in the absence of such regulations.

Second, implying pre-emption from non-regulation is nonsensical because it would accord more pre-emptive effect to the **absence** of federal regulation than to regulation itself, a position at odds with the decisions of this Court. *See, e.g. Freightliner*, 115 S. Ct. at 1488 (lack of federal regulation precluded finding of pre-emption under similar statute and circumstances); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (implied "field" pre-emption only available when a "comprehensive federal scheme intentionally leaves a portion of the regulated field without controls," as opposed to the Boat Safety Act where Congress expressly set forth the method of creating pre-emptive regulations). This position is also contrary to the strong presumptions against pre-emption, which rest on such varied grounds as federalism; the preservation of historic police safety powers; and the recognition that Congress would not deny all tort remedies without comment. *See Cipollone*, 505 U.S. at 516 (Congress must show "clear and manifest purpose" to extinguish historic state police powers); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-716 (1985); *Silkwood*, 464 U.S. at 251. This presumption against pre-emption is particularly strong where, as here, adoption of Respondent's position would ascribe to Congress an intent to pre-empt an entire field of state regulation. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature

of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained").[7]

The agency's decision not to take regulatory action on propeller guards was thus not a properly enacted "regulation prescribed under section 4302." Given the clear intent of Congress, and the rationale in *Freightliner*, the Coast Guard's adoption of an advisory recommendation not to undertake regulatory action does not have pre-emptive effect.

B. Common Law Is Not Within the Domain Expressly Pre-empted By the Boat Safety Act

A further reading of section 4306 confirms that common law is not within the domain expressly pre-empted by the Boat Safety Act. Simply stated, the pre-emption clause does not provide that "common law" actions are pre-empted. Congress has repeatedly shown its ability to

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[7] As so eloquently stated a half century ago,

> Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.

Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., separate opinion).

expressly refer to "common law" when it intends to include it within the scope of a pre-emption clause. *Compare, e.g.* Copyright Act of 1976, 17 U.S.C. § 301(a)(1977) (pre-empting rights "under the common law or statutes of any State"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e)(1989)(pre-empting any "State constitution, statute, court decree, common law, rule, or public policy"); *see also* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1)(1985)(pre-empting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). Congress instead chose the terms "laws, regulations and requirements," to express its pre-emptive intent.

An ordinary reading of the pre-emption clause confirms, in other several distinct ways, that Congress intended only to pre-empt state legislative or administrative actions and not common law. Primarily, "laws, regulations, and requirements" are all terms which connote legislative or executive decision-making processes, as opposed to common law liability. These words were chosen by Congress because, the legislative record reflects, the Act was intended to pre-empt state enactments regarding boat numbering; boat capacities; and safe powering standards. MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 101. "[I]f Congress intended to preclude all common-law causes of action, it chose [ ] singularly odd word[s] . . . with which to do it." *Medtronic*, 116 S. Ct. at 2251 (plurality opinion).

Indeed, the terminology used throughout the entire pre-emption provision confirms that Congress, when it

chose its terms for the pre-emption provision, was intent on pre-empting state legislative or administrative actions instead of common law. The Boat Safety Act's pre-emption provision provides that "a State or a political subdivision of a State" may not "establish, continue in effect, or enforce" a law or regulation which establishes a "performance or other safety standard." 46 U.S.C. § 4306. Each of these clauses, in their common parlance, indicate legislative or administrative enactments instead of the tort system:

> * Petitioners are not asking a "State or a political subdivision of a State" to do anything in this case, but are rather asking a federal district court to allow the application of the forum's long-standing common law.
>
> * It is a stretch of grammar to suggest that the imposition of historic common law is an attempt to "establish, continue in effect, or enforce a law or regulation." Rather, Petitioners merely rely on "the general duty of every manufacturer to use due care to avoid foreseeable dangers in its product." *Medtronic*, 116 S. Ct. at 2258.
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> * Throughout the Act, the term "standard" refers to regulatory standards the Coast Guard may enact under section 4302. *See* 46 U.S.C. §§ 4302(a)(1), (a)(2); 4304; 4311(f)(1), (f)(2). It is a bedrock principle of statutory interpretation that "a word is presumed to have the same meaning in all subsections of the same statute." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983). Thus it may be presumed that Congress intended the term "standard" to refer to state legislative or administrative enactments, especially when that term is used in conjunction with "laws, regulations and requirements."

This result is entirely consistent with previous holdings of this Court, which recognize that the express pre-emption of state "laws or regulations" does not necessarily mean that state tort actions are pre-empted, because the two are not identical in nature or effect. *See, e.g. Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 626-628 (1996)(variations in state tort remedies have "long been deemed compatible with federal maritime interests," and the lack of a federal comprehensive tort recovery regime in the federal act suggests that state tort actions are not pre-empted); *Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions."); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990)(state minimum wage laws, child labor laws, and tort claims would not be pre-empted by federal law at nuclear power plants even though they may affect resource allocation decisions and may alter radiological safety policies); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988)("[t]he effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an award provision. . . . [T]he permission of incidental regulation is consistent with the preclusion of direct regulation. . . . "); *Silkwood*, 464 U.S. at 256 (negligence or strict liability awards not pre-empted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards . . . ").

Common law claims are thus not within the domain expressly pre-empted by section 4306 of the Boat Safety Act.

C. The Savings Clause Clearly Establishes that Common Law Claims Are Not Within The Domain Expressly Pre-empted.

Congress also made clear, through the savings clause of the Boat Safety Act, that it did not intend to include common law actions within the domain pre-empted by the Act. When considering the bill which would ultimately become the Boat Safety Act, a congressional subcommittee was asked to add an express savings provision to clarify that the Act "does not preempt state or common law." MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88. The savings clause was then added into the bill by the subcommittee in response to such concerns, "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. REP. No. 248, 92nd Cong., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352.

Congress therefore provided in the Boat Safety Act that "[c]ompliance with [the Act] does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The express intent of Congress in enacting this Savings Clause was therefore to allow product liability suits to proceed, without manufacturers arguing

that compliance with even express federal law pre-empted such actions.[8]

It is also clear from the legislative history that common law claims are not pre-empted in the *absence* of a federal regulation concerning the safety feature in issue. The Senate subcommittee, in considering the bill, was specifically asked to clarify that the "failure of the (Coast Guard) to promulgate a standard shall not be admissible in a private proceeding," to "preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition." MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88. In response to this request, the congressional subcommittee stated that "[o]f course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value." S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352.

Congress was thus squarely presented with the very question which exists in this case: whether the lack of an enacted standard should have preclusive effect. At this point, Congress did not reply that common law claims were to be pre-empted in the absence of a federal standard on point. Rather, the Senate report stated that "[o]f

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[8] In *Freightliner*, this Court did not reach the question of whether the Motor Vehicle Safety Act's savings clause preserved the plaintiff's common law claims since "no federal safety standard exist[ed]" to create pre-emption. 115 S. Ct. at 1487.

course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value." Thus when Congress was presented with that very question, it did not provide a clear and manifest intent to pre-empt common law actions in the absence of an enacted federal regulation. Instead, it added an express savings clause and stated that the rules of evidence would govern such matters' admissibility.

Congress therefore established in the savings clause of the Boat Safety Act that it expressly had considered "common law" in this piece of legislation. Instead of including it in the pre-emption clause, though, Congress expressly preserved common law from pre-emption by including it in the savings clause. Congress' decision to forego listing "common law" in the Boat Safety Act's pre-emption clause, coupled with its express *inclusion* of that term in the savings clause, is the best evidence of Congress' intent in regard to common law. That intent, as set forth in the express terms of the Boat Safety Act, is to save common law liability from pre-emption. *Compare, e.g., Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." [quoting *Russello v. United States*, 464 U.S. 15, 23 (1983)]).

For its part, the Eleventh Circuit correctly found that Petitioners' common law claims were not expressly pre-empted but then incorrectly held that the claims were impliedly pre-empted. Pet. App. A24. In arriving at this conclusion, the lower court adopted Brunswick's argument that the savings clause would only save a tort of commission (negligent installation of a guard) but not a tort of omission (failure to provide a guard). Cert. Pet. 422. This position is contrary to the text of the Act, however, because section 4311(g) contains no such distinction. Moreover, since no federal requirement prohibits or requires propeller guards, Respondent complies with the Act whether it provides a guard ("commission") or not ("ommission"). That "compliance" does not relieve Respondent from common law under the express terms of the Boat Safety Act. 46 U.S.C. § 4311(g). There is thus no logical or textual reason to imply an unstated limitation into the terms chosen by Congress when adding the savings clause.

II. Common Law Claims Are Not Impliedly Pre-empted by the Boat Safety Act

A. The Boat Safety Act Provides A "Reliable Indicium of Congressional Intent with Respect to State Authority," Raising an Inference that Further Implied Pre-emption is Inapposite

Congressional purpose is the "ultimate touchstone" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 [1963]). The best evidence of Congress'

pre-emptive intent is the "plain wording" of the legislation itself. *CSX*, 507 U.S. at 664. Therefore, when Congress expressly sets forth the pre-emptive scope of an act, there is an inference that Congress has spoken conclusively on the pre-emption question and that further pre-emption should not be found by implication. *Freightliner*, 115 S. Ct. at 1488. Thus if the act provides a "reliable indicium of Congressional intent with respect to state authority," its pre-emptive scope may be "governed entirely" by the express text of the Act. *See Cipollone*, 505 U.S. at 517; *see also Freightliner*, 115 S. Ct. at 1488.

The text of the Boat Safety Act provides just such a reliable indicium of Congressional intent with respect to state authority, since Congress has clearly defined what it intended to pre-empt (46 U.S.C. § 4306); clearly set forth the steps which the Coast Guard must undertake to exercise potential pre-emption (46 U.S.C. § 4302); and clearly set forth what it intended to save from pre-emption (46 U.S.C. § 4311[g]). There is therefore no need to imply further pre-emption. *Expressio unius est exclusio alterius. Cipollone*, 505 U.S. at 517. Indeed, this invitation for imprecise guesswork as to Congress' intent is exactly why implied pre-emption is eschewed in the face of an express pre-emption clause.

This Court has commanded through is precedent that the terms of the federal act are paramount in determining its pre-emptive scope. The implication of pre-emption which Brunswick attempts to draw, and which the lower courts adopted, must therefore fail.

B. It is Not Impossible for Brunswick to Comply with Both the Boat Safety Act and Common Law

In any event, the Lewis Family's common law claims survive implied pre-emption analysis. First, Brunswick may comply with both federal and state law and thus there is no implied "conflict pre-emption." As previously noted, the Coast Guard has never propounded a formal regulation requiring *or disallowing* propeller guards on motor boats under section 4302. Rather, it merely took a preliminary look at the issue and adopted an advisory recommendation not to begin regulation of the issue at the time. Manufacturers such as Brunswick may therefore include guards or not, *free of any federal regulation on the subject whatsoever*, and without any guidance or mandate from enacted Boat Safety Act regulations. Brunswick thus complies with the federal law whether it provides a propeller guard or not, and a finding of common law tort liability will not encourage Brunswick to violate any federal law.

A similar implied pre-emption scenario was rejected in *Freightliner*, where this Court stated that

> Petitioners' pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law. . . . [I]t is not impossible for petitioners to comply with both federal and state law because *there is simply no federal standard for a private party to comply with.* Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 *imposes no requirements either requiring or prohibiting* ABS systems, tractor-trailer manufacturers are free to obey state

> standards concerning stopping distances and vehicle stability.

Freightliner, 115 S. Ct. at 1488 (emphasis added).

C. Petitioners' Common Law Claims Do Not Frustrate the Purposes of Congress

1. There Is No Federal Propeller Guard Mandate To Frustrate

Likewise, the lack of any federal propeller guard regulation promulgated under the Boat Safety Act negates any argument that the imposition of common law liability will frustrate Congress' pre-emptive intent. Congress expressly intended to have the relevant agency prescribe regulations in accordance with the Boat Safety Act if it wished to flex its pre-emptive muscle. Since the agency chose not to follow this express intent of Congress, it is illogical to imply that Congress' intent has been thwarted.

Furthermore, as this Court recognized in *Freightliner*:

> [W]e cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." In the absence of a promulgated safety standard, *the Act simply fails to address the need for ABS devices at all*. Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. *A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.*

Freightliner, 115 S. Ct. at 1488 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 [1941]) (emphasis added).

The Eleventh Circuit held that Petitioner's common law claims were impliedly pre-empted, reasoning that Congress had in effect mandated that only the Coast Guard should regulate the entire field of boat safety. As stated above, this argument overlooks Congress' express mandate to the Coast Guard to take affirmative regulatory action if it wished to create a pre-emptive rule. 46 U.S.C. § 4306; *see also* S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1340 (Congress "requires certain actions by the [Coast Guard] in the development of safety standards," including compliance with both section 4302 of the Boat Safety Act and the Administrative Procedure Act). The Coast Guard has thus recognized that, absent an affirmative regulation on its behalf, state law remains extant. *See* App. 129-130 (relegating personal watercraft regulation and legislation to state and local jurisdictions in the absence of federal action). The legislative history also establishes that Congress clearly intended common law actions to remain viable in the absence of any federal regulation. *See* MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88; S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352 (clarifying that the agency's failure to enact a relevant standard may or may not be admissible in a private proceeding, depending on the jurisdiction's rules of evidence). The implication of pre-emption in this case therefore flies in the face of the Boat Safety Act's express terms and legislative history.

The lower court's interpretation also gives greater pre-emptive weight to the lack of regulation than to a

properly enacted regulation, in contradiction to this Court's precedent. *See, e.g., Freightliner*, 115 S. Ct. at 1488 (lack of federal regulation precluded finding of implied "frustration" pre-emption); *Puerto Rico Dept. of Consumer Affairs*, 485 U.S. at 503-04 (implied "field" pre-emption only available when a federal scheme intentionally leaves a portion of the regulated field "without controls," as opposed to here where Congress expressly set forth the method of creating pre-emptive regulations); *Cipollone*, 505 U.S. at 516 (Congress must show "clear and manifest purpose" to extinguish historic state police powers); *Silkwood*, 464 U.S. at 251 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

2. Common Law Promotes Congressional Purposes

The manifest purpose of the Boat Safety Act is to promote safety. S. REP. No. 248, 92nd Cong., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1333. A secondary goal was "encouraging uniformity among boating laws," *Id.* at 1334; it did not state that it was "mandating" such uniformity. Respondent nonetheless latches on to "uniformity" to urge that Petitioner's claims would frustrate the purposes of Congress. Common law actions may help promote the uniformity of product designs in the absence of agency regulation, however, and thus the saving of common law does not undermine this secondary congressional purpose.

Since there is currently no regulation in place that addresses propeller guards at all, manufacturers may

either provide propeller guards or not. If manufacturers choose to provide propeller guards, moreover, there is no regulation that sets forth whether this protective device should be a shroud, nozzle, screen, or some other configuration. There is no regulation which sets forth what materials these protective devices should, should not, or may contain; there are no regulations as to performance, construction or testing standards; etc.

The situation that exists now, and which is championed by Brunswick, allows manufacturers the unfettered discretion to do whatever they want, however they want, free from regulation on the subject. *This is the least uniform situation possible.* Common law actions, by contrast, could help bring light to this lacuna by providing input as to what are, or are not, reasonable designs. Common law might promote uniformity in comparison to the present state of affairs and, more importantly, it certainly would not undermine uniformity in the absence of a particular federal propeller guard standard.[9]

Moreover, Congress expressly provided that "[c]ompliance with [the Boat Safety Act] does not relieve a person from liability at common law or under state

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[9] Congress originally had to authorize national standards because at least one-fourth of manufacturers were not complying with the industry's self-imposed minimum safety standards under the old legislative regime. MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 82. Congress' policy decision in enacting the Boat Safety Act could therefore not have been to let manufacturers run wholly free from regulatory *and* common law protections.

law." 46 U.S.C. § 4311(g). Thus while uniformity is certainly one of the aims of the Boat Safety Act, Congress expressly provided that States could exercise historic common law powers in derogation of strict "uniformity" to allow for the compensation of tort victims. If the consequence of this preservation of common law or police power was a lessening of uniformity (which Petitioners deny), it was an "evil" that Congress apparently chose to accept. Indeed it is illogical to conclude that the preservation of common law would frustrate congressional purposes, when Congress itself expressly provided for the continued vitality of common law.

In sum, Congress' policy decision in enacting the Boat Safety Act could not have been to allow the victims of tortious behavior to go wholly uncompensated, and the presumption is that Congress did not so intend. *See, e.g. Silkwood*, 464 U.S. at 251 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). At the very least, Congress has not shown a "clear and manifest" intent to preclude this historical state power in the context of motorboat propeller safety.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed and remanded for a trial on the merits.

Respectfully submitted.

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5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

46 U.S.C. § 4302

§ 4302. Regulations

(a) The Secretary may prescribe regulations –

(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard –

(A) meeting the need for recreational vessel safety; and

(B) being stated, insofar as practicable, in terms of performance;

(2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, life-saving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and

(3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

(b) Each regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published, unless

the Secretary finds that there exists a recreational vessel safety hazard so critical as to require an earlier effective date. However, this period may not be more than 24 months for cases involving, in the discretion of the Secretary, major product design, retooling, or major changes in the manufacturing process.

(c) In prescribing regulations under this section, the Secretary shall, among other things –

(1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;

(2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;

(3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

(4) consult with the National Boating Safety Advisory Council established under section 13110 of this title about the considerations referred to in clauses (1)-(3) of this subsection.

(d) Section 8903 of this title does not apply to a vessel being operated for bona fide dealer demonstrations provided without fee to business invitees. However, if on the basis of substantial evidence, the Secretary

decides under this section that requiring vessels so operated to be under the control of licensed individuals is necessary for boating safety, then the Secretary may prescribe regulations requiring the licensing of individuals controlling these vessels in the same manner as provided in chapter 89 of this title for individuals in control of vessels carrying passengers for hire.

* * *

46 U.S.C. § 4306

§ 4306. Federal preemption

Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

* * *

46 U.S.C. § 4311

§ 4311. Penalties and injunctions

(a) A person willfully operating a recreational vessel in violation of this chapter or a regulation prescribed

under this chapter shall be fined not more than $5,000, imprisoned for not more than one year, or both.

(b) A person violating section 4307(a)(1) of this title is liable to the United States Government for a civil penalty of not more than $2,000, except that the maximum civil penalty may be not more than $100,000 for a related series of violations. When a corporation violates section 4307(a)(1), any director, officer, or executive employee of the corporation who knowingly and willfully ordered, or knowingly and willfully authorized, a violation is individually liable to the Government for the penalty, in addition to the corporation. However, the director, officer, or executive employee is not liable individually under this subsection if the director, officer, or executive employee can demonstrate by a preponderance of the evidence that –

(1) the order or authorization was issued on the basis of a decision, in exercising reasonable and prudent judgment, that the defect or the nonconformity with standards and regulations constituting the violation would not cause or constitute a substantial risk of personal injury to the public; and

(2) at the time of the order or authorization, the director, officer, or executive employee advised the Secretary in writing of acting under this clause and clause (1) of this subsection.

(c) A person violating any other provision of this chapter or other regulation prescribed under this chapter is liable to the Government for a civil penalty of not more than $1,000. If the violation involves the operation of a vessel, the vessel also is liable in rem for the penalty.

(d) When a civil penalty of not more than $200 has been assessed under this chapter, the Secretary may refer the matter of collection of the penalty directly to the United States magistrate of the jurisdiction in which the person liable may be found for collection procedures under supervision of the district court and under an order issued by the court delegating this authority under section 636(b) of title 28.

(e) The district courts of the United States have jurisdiction to restrain a violation of this chapter, or to restrain the sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation into the United States, of a recreational vessel or associated equipment that the court decides does not conform to safety standards of the Government. A civil action under this subsection shall be brought by filing a petition by the Attorney General for the Government. When practicable, the Secretary shall give notice to a person against whom an action for injunctive relief is contemplated and provide the person with an opportunity to present views and, except for a knowing and willful violation, shall provide the person with a reasonable opportunity to achieve compliance. The failure to give notice and provide the opportunity does not preclude the granting of appropriate relief by the district court.

(f) A person is not subject to a penalty under this chapter if the person –

(1) establishes that the person did not have reason to know, in exercising reasonable care, that a recreational vessel or associated equipment does not conform with the applicable safety standards of the Government or that the person was not advised by

the Secretary or the manufacturer of that vessel, equipment or component that the vessel, equipment or component contains a defect which creates a substantial risk of personal injury to the public; or

(2) holds a certificate issued by the manufacturer of that recreational vessel or associated equipment to the effect that the recreational vessel or associated equipment conforms to all applicable recreational vessel safety standards of the Government, unless the person knows or reasonably should have known that the recreational vessel or associated equipment does not so conform.

(g) Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.
